Registry's translation, the French text alone being authoritative

NINETY-EIGHTH SESSION

Judgment No. 2415

The Administrative Tribunal,

Considering the complaint filed by Mr P.J.M. G. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 9 December 2003 and corrected on 23 December 2003, the Organization's reply of 22 April 2004 and the letter of 26 August 2004 from the complainant's counsel informing the Registrar of the Tribunal that the complainant did not wish to submit a rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French national born in 1963, worked at UNESCO as a supernumerary from 1997 to 2000 in the Division of Conferences, Languages and Documents. He was offered a two-year fixed-term appointment with effect from 14 August 2000, to the post of binding machine operator in the Printing and Binding Unit. The first year of his appointment was to be probationary. He was promoted as from 1 August 2001 to the post of assembling foreman.

In a memorandum of 30 November 2001 addressed to his immediate supervisor, the complainant asked to be replaced in that post. He said he had "been the target of accusations, harassment, discourteous remarks and attitudes, racism [and] verbal and physical aggression" on the part of his colleagues and complained of the lack of support from his superiors. It was decided that he would be transferred to the Distribution Unit as from 18 February 2002 but several members of that unit objected very strongly to this transfer.

In the performance report which his immediate supervisor signed on 21 February 2002, the latter gave him the overall rating "D" – which corresponds to a "quality and quantity of work slightly below the level required for the performance of some assigned tasks" – criticising him mainly for not having the necessary qualities to perform supervisory duties and for not being respectful towards his colleagues. The complainant's second-level supervisor endorsed the rating but added that "[d]espite his strained relationships following his appointment (opposed by his colleagues) to the post of foreman, [the complainant] remain[ed] the most efficient worker in the Binding Unit thanks to his complete mastery of the machinery, his sense of organisation, his undoubted knowledge of the documents and his dedication to his work". The complainant was sent for training in an outside firm from 5 to 29 March.

In a memorandum of 8 April the complainant was informed that he was "authorised to remain at home at the Organization's disposal […] until further notice". In a memorandum of 23 April, of which he was sent a copy, the Assistant Director-General for Administration decided to reassign the complainant to his former post of binding machine operator with immediate effect. But by a memorandum of 25 April, of which he also received a copy, the same Assistant Director-General informed the Director of Human Resources Management that, "[i]n view of the insufficient performance […] and inappropriate behaviour [of the complainant] and of the unsuccessful outcome of […] internal restructuring efforts", she had "decided to terminate his employment by not renewing his fixed-term appointment when it expire[d] on 13 August 2002" and that he would be placed at the disposal of the Bureau of Human Resources Management from 29 April 2002. In a memorandum of 29 April the Director of that Bureau informed the complainant that the Director-General had decided to confirm that decision. He added that it was not possible to transfer him owing to his "very specialized profile" and informed him that he would be placed on special leave with full pay with immediate effect until further notice.

By memoranda of 26 April and 13 May addressed to the Director-General, the complainant filed a protest seeking the reversal of the non-renewal decision. Having received no reply, he appealed to the Appeals Board on 3 July 2002. In its report dated 30 June 2003, the Appeals Board recommended rejecting the appeal, on the grounds that

the decision not to renew the complainant's fixed-term appointment "was not vitiated either by bias or prejudice or any other extraneous factors" and that it had been taken in the interest of the Organization. By letter of 15 September 2003, which constitutes the impugned decision, the Director-General endorsed the Appeals Board's recommendation and rejected the appeal.

B. The complainant maintains that his virtually uninterrupted employment in the same post from 1997 to 2000, on the basis of 39 supernumerary contracts, should be converted into an "indeterminate contract". He submits that the Tribunal's case law whereby national laws do not, unless they are expressly referred to, apply to the conditions of employment of the staff of international organisations, is irrelevant because supernumeraries are not part of UNESCO's staff. If a denial of rights is to be avoided, therefore, it must be admitted that French law applies. According to that law, a fixed-term contract of employment cannot have either the purpose or the effect of filling on a long-term basis a post related to the enterprise's normal, ongoing activity. Yet that is what happened in this case.

Subsidiarily, the complainant contends that the defendant committed an obvious error of judgement in deciding not to renew his fixed-term appointment. According to the Tribunal's case law, any such decision must be based on a valid reason, which must be given to the staff member. Yet after having been informed on 23 April 2002 of his transfer to the post of binding machine operator, he was told two days later that his contract would not be renewed as a result of "the unsuccessful outcome of […] internal restructuring efforts". He points out that in his performance report of 21 February 2002, under the heading of his performance as a binding machine operator, he had been given a "B" rating – which corresponds to a "quality and quantity of work exceeding often the level required for the performance of assigned tasks". His professional qualities have in fact always been acknowledged by his supervisors. In his view, UNESCO therefore gave mistaken reasons when it maintained that he could not be transferred on account of his very specialised profile without explaining why he was no longer being reassigned to his former post. As for his alleged shortcomings as a foreman, he maintains that he is not the only one to blame for the difficult relationships with his colleagues, as recognised by the Director of the Division. Since his appointment to that post met with opposition even before he took up his duties, it is wrong to suggest that it was his behaviour which caused the tensions. He points out that his behaviour was never criticised in his previous post in the same unit and concludes that the problem arose because his colleagues were envious of his promotion. He blames his superiors for not having provided him with enough support.

The complainant seeks the conversion of his appointment into an "indeterminate contract", the quashing of the impugned decision, the payment of 68,797.90 euros in compensation for the material loss incurred as a result of the loss of salary and pension rights, 14,500 euros for moral injury and 2,280 euros in costs.

C. In its reply UNESCO contends that, insofar as it refers back to the complainant's appointment as a supernumerary, the complaint is irreceivable on two counts. Firstly, the complainant is time-barred from contesting his conditions of employment for the period 1997 to 2000 since he did not challenge them at the time or express any reservations in that respect. To consider the complaint receivable on this point would be tantamount to breaching the principle of legal certainty. Those conditions of employment are, moreover, completely unrelated with the impugned decision. Secondly, it considers that the Tribunal lacks jurisdiction since, according to the General Conditions Applicable to Supernumeraries, any dispute concerning a supernumerary contract must be submitted to the Chairperson of the Appeals Board, who acts as sole arbitrator and whose decision is final and without further recourse. It notes that the complainant himself acknowledges that supernumeraries are not part of UNESCO staff. It maintains he is mistaken in wanting to attribute a "national jurisdiction" to the Tribunal by referring alternatively to the Organization's internal rules and to the legislation of the host country.

On the merits, it denies any obvious error of judgement. The complainant's theory that he was the victim of a conspiracy is totally devoid of credibility and reflects a completely erroneous perception of his role. The main issue, according to the defendant, is whether it was in the interest of the Organization to renew the complainant's contract. The fact is that his performance reports show a limited range of skills, difficulties in his working relationships with his colleagues and immediate supervisors and certain shortcomings in his work. Having received many warnings, he could hardly have been unaware that he was expected to make a major effort and that, if he did not improve, the renewal of his contract was in jeopardy. In that respect UNESCO followed the Tribunal's case law. The Director-General did not therefore abuse his discretionary authority and the complainant, who held a fixed-term appointment, could not claim a "right of renewal". In conclusion, the Organization points out that the reasons for non-renewal were communicated to the complainant and approved by the Appeals Board in its report, which it asks the Tribunal to take into consideration.

CONSIDERATIONS

1. The complainant challenges the Director-General's decision of 15 September 2003 rejecting the appeal he had filed against the decision not to renew his fixed-term appointment.

For his main plea, he argues that his supernumerary status was unlawful and that his appointment should be converted into an "indeterminate contract". Subsidiarily, he contends that the non-renewal of his fixed-term appointment was based on clearly mistaken reasons.

Regarding the unlawfulness of the complainant's supernumerary status and the conversion of his appointment into an "indeterminate contract"

2. The complainant submits that the supernumerary appointment is a contract used by the Organization to hire persons for a short or very short period of time, ranging from a few days to a few months but always less than a year, in order to meet a temporary overload of work or to bring in ad hoc outside expertise. Supernumeraries are excluded from the application of the Staff Regulations and Staff Rules of the Organization. On its internet site the Organization makes it clear that "[t]emporary staff cannot expect to be recruited at the end of their contract. Throughout the duration of their contract with UNESCO they are not considered to be officials or staff members of the Organization". In his view, therefore, the Organization cannot apply to supernumeraries Rule 104.8 of the Staff Rules, entitled "Temporary appointment", which provides that:

"(a) A temporary appointment shall be an appointment for a continuous period of less than one year, ending on a date specified in the Letter of Appointment.

(b) A temporary appointment may, at the discretion of the Director-General, be extended, or converted to a fixed-term appointment; it shall not, however, carry any expectation of, nor imply any right to, such extension or conversion and shall, unless extended or converted, expire according to its terms, without notice or indemnity.

[…]"

He concludes from the foregoing that the status of supernumeraries is governed by ordinary law, that is by national law, in this case French law. In his view, the Tribunal's case law, where it states that "the conditions of employment of staff are subject exclusively to the [Organization]'s own Staff Regulations and to the general principles of the international civil service" and that "[n]ational laws, and in particular those of the host country, apply only where there is express reference thereto" (see in particular Judgment 1311, under 15), does not concern supernumeraries, since they are not part of the Organization's staff.

He points out that he worked from 1997 to 2000 in the Organization as a supernumerary, that he signed 39 supernumerary contracts during that period, that his appointments were practically uninterrupted for three years during which he did not work for any other employer, that he was always assigned to the same post and that those recurring appointments were intended to fill on a long-term basis a post related to the Organization's normal ongoing activity. He concludes that it is therefore reasonable to query the lawfulness of the Organization's use of supernumerary contracts insofar as the purpose was quite clearly not to deal with a temporary overload of work due to exceptional circumstances. After putting forward some considerations regarding the mission pursued by UNESCO, which according to him should work for the defence of human rights and for peace in the world and should not subject its employees to precarious working conditions, he asks the Tribunal to rule in equity to remedy the situation which in his view is unacceptable and must be corrected.

3. The Tribunal considers that, according to its case law and contrary to the views of the complainant, it cannot refer to national law in order to settle a dispute, unless express reference is made to that law in an organisation's regulations or the signed contract, which is not the case here. Indeed, as the defendant maintains without being contradicted, according to paragraph 14 of the General Conditions Applicable to Supernumeraries, contained in Appendix 24L of the UNESCO Manual, "[a]ny dispute concerning the execution or interpretation of a supernumerary contract shall, if it is not amicably settled, be submitted to the Chairperson of the UNESCO Appeals Board acting as a sole arbitrator. The decision of the arbitrator, which shall be final, conclusive and without further recourse, shall also include a determination of the expenses of the arbitration which may be ordered

to be either apportioned between the two parties or paid by one of them only".

This clause, which does not provide for the application of French national law for the settlement of disputes concerning the execution or interpretation of supernumerary contracts, likewise makes no provision for such disputes to be brought before the Tribunal.

4. Even if the Tribunal had jurisdiction, the challenge concerning the unlawfulness of the supernumerary status could not be allowed.

Although the complainant had signed 39 supernumerary contracts, he had never contested his conditions of employment, whether through protests or through a request for arbitration as provided for in the above-mentioned clause. He was therefore time-barred, nearly two years after signing his last supernumerary contract, from challenging the lawfulness of that type of contract.

Furthermore, he unreservedly accepted the offer he was made on 11 August 2000 of a fixed-term appointment starting 14 August 2000 for two years subject to a probationary period. That offer made no reference to the complainant's previous supernumerary contracts. There was therefore a clear intention on the part of the Organization to establish a new working relationship with him to be governed by the Staff Regulations and Staff Rules. The complainant was at liberty to challenge the decision to offer him a fixed-term appointment if he considered that in view of his supernumerary contracts he should have been offered an indeterminate appointment. As he did not do so in due time, he is not entitled, almost one and a half years later, to challenge the lawfulness of his supernumerary contracts and seek the conversion of his appointment into an "indeterminate contract".

Regarding the obvious error of judgement allegedly committed by the Organization in its decision not to renew the fixed-term appointment

5. The complainant contends that the decision of 29 April 2002 not to renew his fixed-term appointment is based on obviously mistaken reasons insofar as one of the reasons mentioned in that decision is that no other job could be found for him owing to his very specialised profile, whereas he could well have been assigned to the post of binding machine operator, as had been envisaged on 23 April 2002.

He adds that in giving as another reason for the decision "some conspicuous shortcomings in [his] conduct and difficult relations with [his] colleagues (immediate supervisor and subordinates) which seriously hamper[ed] the smooth running of the Unit, despite repeated calls to order by [his] supervisors", who considered his conduct "especially harmful in view of [his] position as foreman which require[d] good management and supervision of the Unit's employees", the Director-General based his decision on imprecise and obviously mistaken grounds.

6. The Tribunal, like the complainant, refers to its relevant case law, according to which the non-renewal of an appointment is a matter that lies within the discretion of the appointing authority and the Tribunal may interfere with such a decision only if it was taken without authority, or violates a rule of form or of procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if the decision is tainted with abuse of authority or procedure, or if a clearly mistaken conclusion has been drawn from the facts (see Judgment 291); it also recalls that there must be a valid reason for any decision not to renew a fixed-term appointment and that the reason must be given to the staff member (see Judgment 1154, under 4).

7. In this case the reasons for non-renewal were indeed given to the complainant, namely the shortcomings observed in his conduct and his difficult relations with his colleagues, as well as the impossibility of finding him another assignment in view of his very specialised profile. The question is whether these reasons could justify the non-renewal of a fixed-term appointment.

The Tribunal notes that the decision of 29 April 2002 does give precise reasons to justify the non-renewal of the complainant's fixed-term appointment.

With regard to the complainant's allegation that the reason for the decision was clearly mistaken, the Tribunal notes that he acknowledges that he encountered serious problems in his relations with his colleagues. At the same time, he argues that he was not the only one responsible for that situation insofar as his appointment as foreman met with opposition from the start and his authority had been challenged by his colleagues even before he took up his duties. He suggests it is wrong under those circumstances to assume that it was his behaviour which caused tension within

his unit. He points out that while he worked as a binding machine operator he was never criticised by his superiors about his behaviour or working methods and that it was only from the time he was given responsibility as foreman that he became the target of resentment and envy and that, for the first time in four years, he was criticised for a supposedly disrespectful attitude towards his superiors and an allegedly limited range of skills, for which he was given the overall rating "D" in his performance report. He therefore feels that his failure in performing his duties as foreman was not due to any fault on his part, but rather to the fact that he was not provided with the necessary means to discharge his duties as foreman properly within the context of the Organization's reform. He blames his superiors in particular for not having provided him with adequate support.

Lastly, he maintains that it was to alleviate the tension brought about in his unit by the implementation of the Organization's reform that it had been decided, in order to placate a few individuals, not to renew his appointment.

8. In the light of the foregoing considerations, the Tribunal concludes that the complainant's problems in his relationships and the shortcomings of his conduct were real enough and that he is simply trying to justify them on the grounds of his colleagues' behaviour and his superiors' lack of support, without offering any convincing arguments to back up his assertions.

The shortcomings for which the complainant was criticised had led in his performance report to an overall rating "D", which he contested but which was confirmed by the Reports Board. For its part the Appeals Board, after considering the parties' arguments in detail and holding hearings, concluded that the reasons for the non-renewal of the complainant's contract as given in the decision of 29 April 2002, which was not tainted with any flaw and was taken in the interest of the Organization, were quite sound.

The complainant offers no argument which may cast doubt on the Appeals Board's conclusions.

As it has often recalled, the Tribunal "may not substitute its own judgment for that of the Director-General in regard to the work or conduct or qualifications of the person concerned" (see in particular Judgment 121). In this case, in view of the fact that to retain the complainant after "downgrading" him to the post of binding machine operator, within the same unit despite the fact that he complained about his colleagues, or to assign him to another service which was not suited to his profile, would in either case have been contrary to the interest of the Organization, the Tribunal considers that there is no ground in the submissions which would allow it to interfere.

The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 November 2004, Mr Seydou Ba, Presiding Judge for this case, Mr Agustín Gordillo, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Seydou Ba

Agustín Gordillo

Claude Rouiller

Catherine Comtet